UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DARLENE B., Plaintiff, v. ANDREW M. SAUL, Commissioner of Social Security, Defendant.	CASE NO. C20-5702-MAT ORDER RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1953.[1] She has a high school diploma and previously worked as a cashier, food sales clerk, and accounting clerk. (AR 244, 505-08.)

Plaintiff applied for DIB in September 2015. (AR 180-81.) That application was

[1] Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

denied and Plaintiff timely requested a hearing. (AR 100-02, 104-05, 109-10.)

In June 2017, ALJ S. Andrew Grace held a hearing, taking testimony from Plaintiff and a vocational expert (VE). (AR 36-71.) In November 2017, the ALJ issued a decision finding Plaintiff not disabled. (AR 1-21.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review in August 2018 (AR 22-27), making the ALJ's decision the final decision of the Commissioner.

Plaintiff appealed this final decision of the Commissioner, and the U.S. District Court for the Western District of Washington reversed the ALJ's decision and remanded for further proceedings. (AR 546-49.) ALJ Malcolm Ross held a hearing in January 2020 (AR 484-514) and issued a decision in March 2020 finding Plaintiff not disabled.[2] (AR 463-76.) Plaintiff now seeks judicial review of this decision.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not engaged in substantial gainful activity (SGA) between her amended alleged onset date (August 31, 2015) and her date last insured (DLI) (June 30, 2019). (AR 466.) At step two, it

[2] Plaintiff filed a subsequent DIB application and the ALJ consolidated the claims on remand. (AR 560.)

must be determined whether a claimant suffers from a severe impairment. The ALJ found severe Plaintiff's status post stroke; homonymous scotoma; ankle osteoarthritis; edema; obesity; and major depressive disorder. (AR 466.) Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 466-68.)

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of performing light work with additional limitations: she can occasionally climb. She can frequently balance, stoop, kneel, crouch, and crawl. She can frequently handle and finger bilaterally. She is limited to tasks that require no more than frequent near acuity and occasional use of field of vision. She can withstand only occasional exposure to extreme cold, heat, and hazards such as moving machinery and unprotected heights. She is limited to simple tasks with no conveyor-belt-paced production requirements. She requires standard work breaks and can withstand only occasional, routine workplace changes. (AR 468-69.) With that assessment, the ALJ found Plaintiff capable of performing her past relevant work as a cashier II. (AR 475-76.)

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. The ALJ did not proceed to step five, in light of his finding at step four.

This Court's review of the ALJ's decision is limited to whether the decision is in

accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erred in (1) discounting her subjective symptom testimony, (2) assessing certain medical evidence and opinions, (3) discounting lay evidence, and (4) determining Plaintiff's past relevant work. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed.

Subjective symptom testimony

The ALJ discounted Plaintiff's allegations because (1) the record shows only mild findings and minimal, conservative treatment for her conditions; (2) she was able to work in the past with despite her arthritic pain and cognitive difficulties, and only quit her last job due to poor night vision; and (3) Plaintiff's activities are inconsistent "with the degree of bother asserted" by Plaintiff. (AR 469-72.) Plaintiff argues that these reasons are not clear and convincing, as required in the Ninth Circuit. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

As a primary matter, Plaintiff argues that the ALJ misstated her general allegation in this case: the ALJ asserted that Plaintiff alleged that her impairments "preclude the performance of all full time work activity on a regular and continuing basis" (AR 471), but

Plaintiff argues that she is "alleging that she is unable to perform any past relevant work, and she is limited to no more than sedentary or light level exertion." Dkt. 15 at 9. Plaintiff has not shown that this distinction impacted the ALJ's disability determination and thus has not shown prejudicial error flowing from it.

Plaintiff next argues that the ALJ's first reason is insufficient because the ALJ cannot solely discount her testimony based on a lack of objective support. Dkt. 15 at 9-11. That may be true, but the ALJ did not err in considering the extent to which Plaintiff's allegations of disabling limitations were supported by the record, along with other factors. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects.").

Furthermore, the ALJ not only noted a lack of objective support for some of Plaintiff's allegations, but also pointed out how some of her allegations (cognitive problems) were contradicted by normal objective testing. (AR 471.) This finding also supports the ALJ's assessment of Plaintiff's allegations. *See Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony.").

Plaintiff goes on to challenge the ALJ's second reason, arguing that she described being unable to work for many reasons, including arthritis problems, cognitive/memory problems, anxiety, depression, swelling, and trouble using her hands. Dkt. 15 at 10. But when asked at the first administrative hearing why she quit her last job, Plaintiff cited her

poor night vision. (*See* AR 41-42.) The ALJ did not misquote the record in finding that Plaintiff's most recent job ended as a result of her vision impairment, rather than her arthritis or cognitive difficulty. (AR 471.)

Plaintiff also argues that the ALJ's reliance on her minimal treatment overlooks that there is "no evidence of curative treatment that is available" to her, and that her Crohn's disease prevents her from taking stronger pain medication. Dkt. 15 at 10. But, as noted by the ALJ (AR 470-71), although Plaintiff alleges disability in part due to depression, she has not engaged in counseling or therapy and only tried one medication. Examining psychologists opined that therapy and medication would be helpful for Plaintiff. (AR 415, 841.) There is also evidence that Plaintiff's lack of pain medication was due at least in part to a personal preference (AR 456 (treatment note indicating Plaintiff decided not to treat her neuropathic pain)), and although the record shows that ibuprofen sometimes caused Plaintiff to experience Crohn's flares (AR 857), there is no evidence that other medications were also precluded. The ALJ did not err in finding that this evidence of minimal treatment undermined her allegation of disabling limitations. *See Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints where petitioner's "claim that she experienced pain approaching the highest level imaginable was inconsistent with the 'minimal, conservative treatment' that she received").

Plaintiff argues that the ALJ's reasoning regarding activities is not sufficiently specific, and the Court agrees. The ALJ found that Plaintiff's "demonstrated functioning is also inconsistent with the degree of bother asserted." (AR 472.) But the ALJ goes on to cite activities that Plaintiff self-reported and the ALJ summarized earlier (AR 469), and the ALJ

does not explain how activities that Plaintiff self-reported contradict her allegations. Thus, the ALJ neither pointed to an inconsistency between Plaintiff's activities and her allegations, nor found that Plaintiff's activities demonstrate the existence of transferable work skills, and therefore the ALJ's finding regarding activities is erroneous. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities may undermine credibility where they (1) contradict the claimant's testimony or (2) "meet the threshold for transferable work skills").

This error is harmless, however, in light of the ALJ's other independent reasons to discount Plaintiff's allegations. *See Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008). Thus, because Plaintiff has not shown harmful error in the ALJ's discounting of her allegations, the Court does not disturb this portion of the ALJ's decision.[3]

Medical evidence

Plaintiff argues that the ALJ erred in assessing multiple medical opinions, each of which the Court will address in turn.

Legal standards

In general, more weight should be given to the opinion of a treating doctor than to a non-treating doctor, and more weight to the opinion of an examining doctor than to a non-examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).[4] Where not contradicted by another doctor, a treating or examining doctor's opinion may be rejected only

[3] Plaintiff also devoted pages of her opening brief to summarizing her hearing testimony (Dkt. 15 at 12-15), and this section does not advance her assignment of error and need not be discussed.

[4] Because Plaintiff applied for disability before March 27, 2017, the regulations set forth in 20 C.F.R. § 404.1527 apply to the ALJ's consideration of medical opinions.

for "'clear and convincing'" reasons. *Lester*, 81 F.3d at 830 (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining doctor's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Lester*, 81 F.3d at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

Jeanne Adams, M.D.

Dr. Adams, Plaintiff's treating physician, completed form opinions in May 2017 and December 2019 describing Plaintiff's limitations. (AR 451-53, 884-87.) The ALJ summarized Dr. Adams' opinions and explained that he gave them "low weight" because (1) they are checkbox forms and contain only "a conclusory narrative evaluation"; (2) Dr. Adams provided only routine, conservative treatment that does not support the significant limitations she described; (3) Dr. Adams' conclusions are inconsistent with the many other largely unremarkable physical examination findings, as well as Plaintiff's range of activities; and (4) Dr. Adams attributed limitations to Crohn's disease, but the records show that Plaintiff's Crohn's disease has been in remission since 1996. (AR 474-75.5) Because the ALJ found Dr. Adams' opinions to be inconsistent with the longitudinal record, the ALJ found that "it appears that [her] opinions are based more on the claimant's subjective allegations, the reliability of which is undermined . . . ." (AR 475.)

Plaintiff contends that Dr. Adams did not merely check boxes or write conclusory

[5] The ALJ also noted that Dr. Adams' opinions were inconsistent with the State agency opinions, but the ALJ did not indicate why he preferred the State agency opinions and thus this reason does not explain the weight given to Dr. Adams' opinions. It does, however, indicate that the ALJ's reasons to discount Dr. Adams' opinions must be specific and legitimate, because the opinions are contradicted.

comments. Dkt. 15 at 4. On the contrary, the substance of the opinions is nearly entirely checked boxes, with an occasional conclusory comment written in. (AR 451-53, 884-87.) Furthermore, in the 2019 opinion, Dr. Adams was asked to list the clinical findings and objective signs that supported her opinion, and she left that portion of the form blank. (AR 884.) The ALJ reasonably found that Dr. Adams' opinions were unexplained and did not err in discounting them on that basis. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) ("[T]he ALJ may 'permissibly reject[ ] . . . check-off reports that [do] not contain any explanation of the bases of their conclusions.'" (quoting *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996))); *Thomas*, 278 F.3d at 957 ("The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings.").

Plaintiff also argues that the ALJ erred in finding Dr. Adams' opinions to be inconsistent with the conservative, routine treatment she provided for Plaintiff, because there is "no evidence of more intensive, curative treatment that is appropriate or available." Dkt. 15 at 4. Nonetheless, the ALJ's rationale is reasonable because the Dr. Adams' treatment notes consist primarily of medication refills and routine tests, none of which describe the severe limitations described in the opinions. (*See* AR 454-59, 804-27, 844-52, 873-83.) Under these circumstances, the ALJ reasonably found Dr. Adams' treatment notes to be inconsistent with her conclusions. *See Rollins*, 261 F.3d at 856 (upholding rejection of treating physician's opinion based on discrepancy between the opinion and the physician's description of the claimant and prescription of a conservative course of treatment). Even if, as Plaintiff emphasizes (Dkt. 15 at 4), Dr. Adams had 40 years of experience treating Plaintiff, Plaintiff

has not shown that the ALJ was unreasonable in finding that her treatment notes of record do not corroborate the significant limitations she indicated in her opinions.

Plaintiff raises other arguments regarding Dr. Adams' opinions (Dkt. 15 at 4) that would at most establish harmless error, given that the ALJ provided multiple valid reasons to discount the opinions, as indicated here. Accordingly, the Court affirms the ALJ's assessment of Dr. Adams' opinions.

Peter Weiss, Ph.D.

Dr. Weiss performed a psychological examination of Plaintiff in December 2015 and wrote a narrative report describing her symptoms and limitations. (AR 410-15.) The ALJ gave Dr. Weiss's opinion great weight. (AR 472.)

Plaintiff argues that the ALJ inaccurately summarized Dr. Weiss's opinions in various ways (Dkt. 15 at 5), but has not shown that any of these purported inaccuracies demonstrate that Dr. Weiss's opinion was devoid of all probative value, such that the ALJ was required to discount it. Plaintiff has also not shown that Dr. Weiss's opinion was not fully accounted for in the ALJ's RFC assessment. Accordingly, Plaintiff has not met her burden to show that the ALJ erred in crediting Dr. Weiss's opinion.

State agency opinions

The ALJ gave great weight to the State agency psychological opinions. (AR 473.) Plaintiff argues that the ALJ erred in failing to account for a consultant's opinion that Plaintiff had "[s]lowed processing speed and diminished concentration." (*See* AR 97.) But the consultant's opinion identified specific limitations that account for those deficits: a restriction to performing simple tasks for two-hour periods over an eight-hour workday within a 40-hour

workweek. (*See* AR 96-97.) The ALJ's RFC assessment is consistent with those limitations. (AR 469.) Thus, Plaintiff has not shown that the ALJ erred in assessing that portion of the State agency opinion.

Plaintiff goes on to argue that the ALJ did not account for all of the moderate limitations described by the State agency consultants, nor the "intermittent interruptions" found by one consultant that would nonetheless allow Plaintiff to "complete work tasks within an acceptable time frame" (AR 82), even though the ALJ mentioned those limitations in his summary of the State agency opinions. (*See* AR 473.) But the ALJ did include the specific limitations identified by the State agency consultants, and those limitations represent the consultants' translation of those moderate deficits into concrete restrictions. Because Plaintiff has failed to show that the ALJ's RFC assessment is actually inconsistent with the State agency opinions either as to the moderate deficits or as to the "intermittent interruptions," she has failed to meet her burden to show error in this aspect of the ALJ's decision.

Lastly, Plaintiff argues that the ALJ erred in indicating that he found Plaintiff more limited than as described in two other State agency opinions from 2018 and 2019 in an effort to give Plaintiff "all possible benefit of the doubt" (AR 474), because the ALJ did not actually give Plaintiff the benefit of the doubt and instead discounted much of her subjective testimony. Plaintiff appears to have missed the ALJ's point: that he found Plaintiff more limited than 2018 and 2019 State agency opinions filed in connection with her subsequent application, in order to account for the other evidence in the record, even though he gave great weight to the recent State agency opinions. (AR 473-74.) Plaintiff has not identified any harmful legal error stemming from the ALJ's assessment of the 2018-19 State agency

opinions.

Miscellaneous medical evidence

Plaintiff summarizes various medical findings in the record, in an effort to show that the ALJ erred in considering the medical evidence. Dkt. 15 at 7-8. Most of this evidence does not support the existence of any particular error in the ALJ's decision, and need not be discussed further.

To the extent that Plaintiff also points to certain opinions credited by the ALJ and identifies reasons why these opinions should have been discounted (Dkt. 15 at 8), the Court declines Plaintiff's invitation to reweigh this evidence.

For all of these reasons, the Court rejects Plaintiff's assignment of error in the ALJ's assessment of the medical evidence.

Lay evidence

Plaintiff challenges the ALJ's discounting of various lay statements.[6] Dkt. 15 at 15-17. Plaintiff does not identify the ALJ's reasons for discounting the lay statements, but simply asserts that the ALJ's reasons are not supported by substantial evidence nor germane to the witnesses, as an ALJ's reasons to discount a lay statement are required to be in the Ninth Circuit. *See Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993) ("If the ALJ wishes to discount the testimony of the lay witnesses, he must give reasons that are germane to each witness.").

[6] Plaintiff also argues that the ALJ did not discuss one particular part of a lay statement. Dkt. 15 at 15. Plaintiff has not identified any authority requiring an ALJ to summarize any particular part of a lay statement, nor has Plaintiff shown that the ALJ's reasoning would not apply to that part of the lay statement or that the omission was otherwise prejudicial.

The ALJ summarized lay statements written by Plaintiff's friend and daughter, as well as observations recorded by agency personnel, and explained that he found them inconsistent with Plaintiff's unremarkable physical examination findings, entirely normal psychiatric findings, and her activities that demonstrate the ability to adequately communicate and complete tasks that require a minimum level of persistence. (AR 475.) Inconsistency with the medical evidence and a claimant's activities are both germane reasons to discount lay evidence. *See Carmickle*, 533 F.3d at 1164 (activities); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (medical evidence). Because Plaintiff has not explained why the evidence cited by the ALJ is not inconsistent with the lay statements, Plaintiff has failed to identify an error in the ALJ's assessment of the lay statements. Accordingly, Plaintiff has not met her burden to show error in the ALJ's assessment of the lay statements.

Step four

Plaintiff bears the burden of showing she does not have the capacity to engage in past relevant work. Past relevant work is work (1) performed within the past fifteen years, (2) constituting SGA, and (3) lasting long enough for the individual to have learned how to perform the work. 20 C.F.R. §§ 404.1560(b)(1), 404.1565(a), 416.960(b)(1), 416.965(a).

SGA "is work done for pay or profit that involves significant mental or physical activities." *Lewis v. Apfel*, 236 F.3d 503, 515 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1571-404.1572 & 416.971-416.975). For the year 2004, average earnings of more than $810.00 per month ordinarily show that work is SGA; that amount was raised to $830/month in 2005. *See* 20 C.F.R. §§ 404.1574(b), 416.974(b); https://www.ssa.gov/oact/cola/sga.html (last accessed April 29, 2021). However, earnings are a presumptive, not a conclusive sign of whether a job

constitutes SGA. *Lewis*, 236 F.3d at 515. The presumption arising from low earnings shifts the step-four burden from the claimant to the Commissioner. *Id*. "Without the presumption, the claimant must produce evidence that he or she has not engaged in [SGA]; if there is no such evidence, the ALJ may find that the claimant has engaged in such work. With the presumption, the claimant has carried his or her burden unless the ALJ points to substantial evidence, aside from earnings, that the claimant has engaged in [SGA]." *Id*. (noting relevant factors pursuant to the regulations, including "the nature of the claimant's work, how well the claimant does the work, if the work is done under special conditions, if the claimant is selfemployed [sic], and the amount of time the claimant spends at work" (citing 20 C.F.R. §§ 404.1573, 416.973)).

In this case, the ALJ found that Plaintiff's past work as a cashier II, which ended in March 2005, constituted SGA. (AR 475-76.) The parties agree that Plaintiff's cashier II earnings were below the SGA threshold, but the Commissioner argues that this work could nonetheless constitute SGA. Dkt. 16 at 18. It could, but the ALJ did not show that it did: the ALJ did not acknowledge that Plaintiff's earnings fell below the SGA threshold or make any particular findings about the circumstances of that job that would explain why it nonetheless constituted SGA. (AR 475-76.) The ALJ did not, therefore, satisfy the Commissioner's burden at this step, and the Court declines any invitation (Dkt. 16 at 18) to make such findings in the first instance. *See, e.g.*, *Masterson v. Colvin*, 2017 WL 2953957, at *9-10 (S.D. Cal. Jul. 11, 2017).

Furthermore, the Commissioner's brief misrepresents the ALJ's findings regarding Plaintiff's work history in an attempt to bolster the ALJ's SGA finding: the Commissioner

acknowledges that Plaintiff's unskilled cashier job in 2004-05 fell below the SGA threshold, but goes on to emphasize that Plaintiff's semi-skilled cashier job that she held in 2005-06 exceeded the threshold earnings amount, and that these jobs together show that she performed SGA as a cashier within 15 years of her DLI. Dkt. 16 at 18. This argument overlooks the distinction between the unskilled cashier job and the semi-skilled cashier job: the ALJ's step-four finding is based only on Plaintiff's ability to perform her past *unskilled* cashier job, because the VE testified that she would not be able to perform the semi-skilled cashier job in light of the ALJ's RFC assessment. (*See* AR 508.) Any reference in the Commissioner's brief to the semi-skilled cashier job is a distraction from the ALJ's stated step-four finding, which is based solely on Plaintiff's past unskilled cashier job.

Thus, the Court finds that the ALJ's step-four finding does not satisfy the Commissioner's burden to show that Plaintiff can perform her past relevant work as a cashier II, despite her low earnings in that position.

CONCLUSION

For the reasons set forth above, this matter is REVERSED and REMANDED for further administrative proceedings. On remand, the ALJ should reconsider the step-four findings and further develop the record regarding Plaintiff's cashier II work history, if necessary.

DATED this 21st day of April, 2021.

Mary Alice Theiler
United States Magistrate Judge